

NATIONAL LABOR RELATIONS BOARD
REGION 5
CHARLES L. POSNER, REGIONAL DIRECTOR

Case No. 05-RC-137335

In the Matter of:

VEOLIA TRANSPORTATION,

Employer,

and

LOCAL 689, AMALGAMATED TRANSIT
UNION

Petitioner (Union).

Re: Road Supervisors Petition
for Representation

PETITIONER UNION
POST-REVIEW MEMORANDUM

Petitioner Amalgamated Transit Union Local 689 (hereinafter "Local 689" or the "Union") duly filed a Petition with the Board under section 9(c) of the National Labor Relations Act. Local 689 was seeking to represent a unit of employees working as Road Supervisors and Lead Road Supervisors for the employer Veolia Transportation Services (hereinafter "Veolia" or the "employer"). A hearing was held on October 7, 2014 before Hearing Officer Jason Usher at the National Labor Relations Board facility at 1099 14th Street NW in Washington, DC. Following the submission of post hearing briefs by both parties, Regional Director Charles Posner issued a decision on October 27, 2014 which found that the Road Supervisors and the

Lead Road Supervisors were supervisors under section 2 (11) of the Act. Following the denial of the petition, Local 689 filed a Request for Review which was granted on April 21, 2015. For the reasons set forth below, the original decision should be reversed because the Road Supervisors and Lead Road Supervisors are not “supervisors” under the act.

INTRODUCTION

Veolia provides transportation services for elderly and disabled persons who are unable to drive or use public mass transit services. The aspect of its operation at issue in this case is its operation under a subcontract with the Washington Metropolitan Area Transit Authority (“WMATA”) using modified vans to transport under the trade name “MetroAccess” throughout the Washington, D.C. metropolitan area. WMATA is a public body, imbued with political authority as a result of a Compact enacted by the State of Maryland, the Commonwealth of Virginia, the District of Columbia and the Congress of the United States. (40 U.S.C. §§ 18301-18304) It owns and operates Metrorail, Metrobus and the elderly and disabled service called MetroAccess. Unlike Metrorail and Metrobus, however, WMATA retains by subcontract a number of firms to operate its MetroAccess van fleet. Veolia is one such contractor. Others include Diamond Transportation, First Transit, Inc. and MV Transportation, which operate the central call center. When a patron has been authorized to use MetroAccess, they contact WMATA’s call center to request transportation to a particular location on a particular day and at a particular time. WMATA then puts a series of such requested trips together for assignment to an operator, who collects fares and provides successive trips as set forth each day by WMATA. Schedule changes are frequent during the day and are undertaken by WMATA’s own call center.

Veolia drivers are in regular communication with WMATA's dispatch/call center, and must adhere to a wide variety of rules established by WMATA. The vans are depicted as "MetroAccess" vehicles and have no markings to distinguish one subcontractor from the next. (Tr. 161)

ISSUE

I. Diamond Transportation Road Supervisor Decision

WMATA requires that each contractor retain both drivers and a limited number of Road Supervisors. On February 10, 2014 the Board issued a Certification of Representation between First Transit and Local 689 ATU that included road supervisors as part of the bargaining unit. (See attached) The issue before the Board is identical to a recent matter in which Regional Director Posner issued his ruling on September 19, 2014. In case number 05-RC-134217, Diamond Transportation Services and Amalgamated Transit Union, Local 689, the Board ruled that the WMATA Metro Access Road Supervisors were not supervisors within the meaning of Section 2(11) of the Act. Rather they were to be considered members of the petitioned-for unit and a secret ballot election was directed to be held. (P. 2)

The Ruling stated in part,

"I find that the record evidence does not establish that road supervisors have the authority to discipline employees, or to effectively recommend their discipline. On the latter point, I conclude that the Employer did not establish by a preponderance of the evidence that road supervisors effectively recommend the issuance of safety points, provide oral warnings to operators or otherwise effectively recommend discipline. Furthermore, I find that, even assuming that road supervisors discipline employees or effectively recommend their discipline, the Employer did not meet

its burden to show that road supervisors exercised the requisite independent judgement. Accordingly, I am directing an election in a unit comprised of road supervisors.” (P. 29)

In finding that the employer failed to meet their burden of showing that the road supervisors issue discipline, the Regional Director reasoned that any oral warnings issued by road supervisors were not part of progressive discipline. The decision says,

“I also find that a road supervisor’s warnings do not lay the foundation for future, or additional discipline; the Employer has not provided examples of an employee who received a written warning, suspension, or termination which cite a prior oral warning as the reason for the increased level of discipline. The Board has recognized that the authority to issue minor corrective actions, such as verbal and written warnings, is too minor a disciplinary function to confer supervisory status when there is no evidence that the warnings form the basis for further disciplinary or otherwise affect job status. Ohio Masonic Home, Inc., 295 NLRB 390, 393-394 (1989); Passavant Health Center, 284 NLRB 887, 889 (1987), cited in Mountaineer Park, Inc., 343 NLRB 1473, 1477 (2004).”

Following the issuance of that decision, the parties (Local 689 and Diamond Transportation) have begun bargaining and have exchanged proposals.

II. The Veolia Road Supervisors and Lead Road Supervisors are not “supervisors” under section 2 (11) of the Act

The employees who are employed by Veolia as Road Supervisors and Lead Road Supervisors were improperly characterized in the prior decision as supervisors. (Veolia Transportation 05-RC-137335) It was improper for the Regional Director to label them as supervisor and that decision should be reversed so as to allow the employees to become part of the certified bargaining unit.

A. Definition of Supervisor

The National Labor Relations Act (hereinafter the "Act") defines what a supervisor is in Section 2 (11):

(11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

When applying this criteria, the Supreme Court ruled,

"The text of § 2(11) of the Act that we quoted above, 29 U.S.C. § 152(11), sets forth a three-part test for determining supervisory status. Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their 'exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,' and (3) their authority is held 'in the interest of the employer.' NLRB v. Health Care & Retirement Corp. of America, 511 U.S. 571, 573-574, 114 S.Ct. 1778, 128 L.Ed.2d 586 (1994)."

N.L.R.B. v. Kentucky River Community Care, Inc., 532 U.S. 706, 712-713 (2001)

To meet the standard the Board has stated,

"The Board has long recognized that purely conclusory evidence is not sufficient to establish supervisory status; instead, the Board requires evidence that the employee actually possesses the Section 2(11) authority at issue. See, e.g., Volair Contractors, supra, 341 NLRB at 675; Sears, Roebuck & Co., 304 NLRB 193, 194 (1991). Consistent with this requirement, in determining whether accountability has been shown, we shall similarly require evidence of actual accountability. This is not to say that there must be evidence that an asserted supervisor's terms and conditions of

employment have been actually affected by her performance in directing subordinates. Accountability under Oakwood Healthcare requires only a prospect of consequences. But there must be a more-than-merely-paper showing that such a prospect exists.”

Golden Crest, 348 NLRB 727, 731 (2006)

A pivotal factor for an employee to be classified as a “supervisor” is their capacity to issue discipline. The parameters are:

“Managerial employees are defined as those who formulate and effectuate high-level employer policies or “who have discretion in the performance of their jobs independent of their employer's established policy.” General Dynamics Corp., 213 NLRB 851, 857 (1974); see generally NLRB v. Yeshiva University, 444 U.S. 672, 682 (1980). Although the Board has no firm criteria for determining managerial status, an employee will not ordinarily be excluded as managerial unless he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy. Allstate Insurance Co., 332 NLRB 759, 762 (2000).”

The Republican Co., 361 NLRB No. 15, at 5 (2014)

Arguably the most important aspect of being classified a “supervisor” is having the ability to exercise and use one’s own “independent judgment” when making decisions.

“Thus, as a starting point, to exercise ‘independent judgment’ an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data. As more fully explained below, however, these requisites are necessary, but not in all instances sufficient, to constitute ‘independent judgment’ within the meaning of the Act. As we said above, although we start with the ‘ordinary meaning of the words used,’ INS v. Phinpathya, supra, 464 U.S. at 189, we also consider the Act as a whole, its legislative history, policy considerations, and judicial precedent. Here, we must interpret ‘independent judgment’ in light of the contrasting statutory language, ‘not of a merely routine or clerical nature.’ It

may happen that an individual's assignment or responsible direction of another will be based on independent judgment within the dictionary definitions of those terms, but still not rise above the merely routine or clerical...Consistent with the Court's view, we find that a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement.”

Oakwood Healthcare Inc., 348 NLRB 686, 692-693 (2006)

Taking the legal benchmarks, the Board crafted a decision for a remarkably similar matter involving Road Supervisors in Lucky Cab Co., 360 NLRB No. 43. The Board ruled that Road Supervisors were not “supervisors” under section 2 (11) of the Act. Stating in part,

“By providing no evidence that discipline emanated directly from the SDRs submitted by the road supervisors, the General Counsel has failed to make the required showing that the road supervisors, through the SDRs, affected the job status or tenure of the drivers. Nor does the record support the judge's finding that the SDRs constituted effective recommendations of discipline because the Respondent ‘regularly based discipline’ on them without conducting an independent investigation. This finding rests solely on Dante's equivocal and contradictory testimony about the consequences of smoking in the cab, about which she variously testified that discipline ‘would,’ ‘should,’ and ‘might’ ensue for this reported infraction. For the same reason that this testimony fails to establish that discipline flows automatically from the SDRs, it does not support a finding that the road supervisors, through the SDRs, effectively recommend discipline for smoking or for any other infraction that they report. As the D.C. Circuit's stated in Oil Chemical & Atomic Workers v. NLRB, ‘what the statute requires is evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority.’ The record here lacks any documented examples of discipline that directly resulted from the road supervisors' SDRs. Contrary to the judge, we find that Dante's testimony is no substitute for such evidence. Because the General Counsel has not shown that the road supervisors' reportorial function in documenting driver misconduct had a demonstrable affect on

drivers' job status, we conclude that his burden of proving supervisory status has not been met. Therefore, we reverse the judge's finding that Road Supervisor Jacobs' statements to Hambamo violated Section 8(a)(1). Shaw, Inc., 350 NLRB 354, 358 (2007). Accordingly, we dismiss this allegation."

Lucky CabCo., 360 NLRB No. 43, at 4-5

The matter presently before the Board is in line with Lucky Cab and Diamond Transportation. Therefore, the Regional Director was in error when he ruled that Road Supervisors for Veolia were "supervisors" and this decision should be reversed.

- B. The previous decision mislabeled Road and Lead Road Supervisors as "supervisors"

The Regional Director's decision issued on October 27, 2014 looked at the above cited criteria and stated,

"To meet this standard, the party bearing the burden must establish that an individual 'actually possesses' a supervisory power; mere inferences or conclusory statements of such power are insufficient. Golden Crest, 348 NLRB 727, 731 (2006)...To confer supervisory status based on authority to discipline, the exercise of disciplinary authority must lead to personnel action without independent investigation by upper management. See, e.g., The Republican Co., 361 NLRB No. 15 (2014) citing Sheraton Universal Hotel, 350 NLRB 1114, 1116 (2007) ("Contrary to the judge's speculation, nothing in the record suggests that upper management conducted an independent investigation before deciding to impose discipline...'). Warnings that simply bring the employer's attention to substandard performance without recommendations for future discipline serve a limited *reporting* function, and do not establish that the disputed individual is exercising disciplinary authority. Id. at 5 (citing Willamette Industries, 336 NLRB 743, 744 (2001)). Similarly, authority to issue verbal reprimands is, without more, too minor a disciplinary function to constitute supervisory authority. Id. (Citing Vencor Hospital-Los Angeles, 328 NLRB 1136, 1139 (1999) and Ohio Masonic Home, 295 NLRB 390, 394

(1989))....It is clear from the record that road supervisors and lead road supervisors have the authority to orally counsel operators, orally warn operators, issue written warnings to operators, and remove operators from service, at least temporarily until further information can be obtained...These circumstances are in marked contrast to those in Diamond Transportation.” (P. 15)

When issuing this discipline it was use of “independent judgment” that was a major factor in classifying the employee’s as supervisors. Due the Director’s determination that discipline was issued by the Road Supervisors, the burden of establishing that they were “supervisors” had been met. He found that it is clear the Road Supervisors do not have any involvement with the assignment of work and found it was unnecessary to analyze whether the rewarding of employees was an indication of supervisor status. With regards to secondary indicia supporting the determination that they were supervisors, the fact that they wore different uniforms and the ratio of Road Supervisors to drivers satisfied the Regional Director.

1. The Road Supervisors do not assess discipline to properly be labeled a supervisor

The matter in the Diamond Transportation case (05-RC-137335) is virtually identical since Road Supervisors (also referred to as “Street Supervisors”) for WMATA Metro Access perform the same duties under the WMATA/Veolia as they do for Diamond Transportation. However, the Regional Director ruled that the Veolia Street Supervisors were to be considered Supervisors under the Act. The Regional Director determined that Road Supervisors at Diamond did not have the power to issue discipline under the meaning of Section 2(11) of the Act since there issuance of any warning or reprimand was not the foundation for future discipline. The Regional Director in the current matter disagreed with that line of thinking.

In fact, all road supervisors who work for WMATA through their respective contractors do the same job. A road supervisor, no matter which contractor they are employed by, is to be the eyes and ears for WMATA. The job is designed by the WMATA contract and the scope of duties are generated by WMATA's requirements as well. Their main purpose is to observe what is happening in the field and report what they observe. Only a truly egregious violation may cause them to pull someone from service. Even then, actual discipline is administered later, by others. During the hearing for this case, Brian Jackson, Road Supervisor, stated that when road supervisors are in the field they are keeping an eye on matters,

"Well, we are given the commission to go out and monitor the street and particularly looking and observing the behaviors, the patterns, the policies being followed by operators in particular. We don't check anybody else but operators. So we – some of us are assigned to go to certain facilities, hospitals, or some mental group home type of spots, whatever, where there's high traffic, we note those are high traffic areas, and we'll post up there for in excess of an hour or two depending on how long it might be, and we'll observe. We don't get a chance to touch everybody because it's a fast pace thing going on, but we do observe things going on, and in those instances, if there's any time that we see something going on that might not follow, you know, protocol, then we are advised to make sure that we go and talk to them and address them one way or another." (TR 75)

When dealing with accidents, the road supervisors do not discipline employees. Rather they observe, report, and make an initial determination whether an accident was preventable. Mr Jackson testified at the hearing:

Mr. Taylor: So you've investigated an accident. You've determined it's preventable. You turned that in, and somebody decides they agree with you and something should be done with the employee. All right. Now, at that point, what form do you fill out that

instructs the employee that they've been disciplined, that they've got a suspension?

Mr. Jackson: I don't fill out any forms for discipline.

Mr. Taylor: If an employee is suspended, does someone else take care of that?

Mr. Jackson: Yes, mainly the operations manager.

(TR 165)

2. The Road Supervisors exercise no independent judgment but only follow WMATA protocol

Even the removal of an employee from service for a "door-to-door" violation is nothing more than standard procedure. Mr. Holtz, Road Supervisor, testified:

Mr. Connolly: Okay you discussed earlier that a door-to-door violation is very serious. How do you— as a road supervisor, you observe a door-to-door violation. How do you go about removing the employee from service?

Mr. Holtz: First of all, I've got to make sure that door-to-door violation is committed, okay, that that driver actually committed a door-to-door violation, and there are certain things that as road supervisors, we have to look for when a door-to-door violation is committed. A door-to-door violation commitment could be a driver not getting out of their seat and escorting the client from the door to the vehicle. A door-to-door violation could be a driver going to a facility where there's only one door entrance to the building, and the driver goes to that entrance of that door inside the facility to retrieve a client. They're just certain things we look for, and once that violation is committed, again the protocol is to call Hyattsville and let them know that I've taken a driver out of service.

Mr. Connolly: Okay

Hearing Officer Usher: This door-to-door policy, whose policy? Is this WMATA or Veolia?

Mr. Holtz: WMATA's, yes, sir. Strictly WMATA's.

(TR 213)

Veolia and Diamond Transportation are private companies that have contracts with the Washington Metropolitan Area Transit Authority to provide paratransit services. In each case, the bargaining unit is confined to WMATA operations. The vans these companies operate are depicted as "MetroAccess" vehicles and have no markings to distinguish one subcontractor from the next. (Tr. 161) At the hearing, Mr. Holtz testified that prior to working for Veolia he had been a road supervisor for predecessor MV Transportation under their MetroAccess contract. (TR 204) Mr. Holtz testified that the checklist presented at the hearing, exhibit 9, was basically the same one he had used when at MV. (TR 207) Exhibit 13, the accident kit, was also very similar to the one used by MV and he was trained to use it by WMATA. (TR 213) The Regional Director's decision also referenced their prior employment by a different contractor saying,

"Furthermore, while Jackson and Holtz testified as to their knowledge of a range of policies and procedures handed down by WMATA and Veolia, Holtz clearly stated that he had not been given copies of these rules in his capacity as a road supervisor. Much of Holtz's and Jackson's knowledge of the rules and policies seems to originate in the training they received, and the experience they accumulated, at their previous employer, MV." (P. 17)

The decision also acknowledged that the training is provided for by WMATA so the Road Supervisors are familiar with WMATA standards. The decision states,

"Road and lead supervisors also undergo considerable training regarding the policies and procedures they are expected to enforce on behalf of WMATA and Veolia....road and lead supervisors attend monthly meetings organized by WMATA, at which WMATA reviews policy and procedure." (P. 22)

The Road Supervisors in fact do not take any action unless it has been prescribed by WMATA. In Oakwood Healthcare, the Board ruled that “independent judgment” does not exist where:

“we find that a judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority” Id.

Road Supervisors for Veolia do not actually assess any discipline, only follow instructions given to them by WMATA. They do not have discretion to determine what actions may constitute a violation. All the Road Supervisors do is follow a prescribed set of rules from WMATA that outline step by step what actions they are to perform. When asked about discretion the road supervisor may have, Road Supervisor Holtz testified to the following:

Mr. Connolly: Okay. Now you mentioned that you have discretion, but are you trying to just follow safety policy or policies given by WMATA or Veolia, or are you allowed to go out there and really just – if you don’t like something, you’re allowed to write them up for it?

Mr. Holtz: I mean if I see something that’s incorrect yeah—I’m going to write them up.

Mr. Connolly: Incorrect in your book or incorrect under WMATA?

Mr. Holtz: Under their policies – and procedures, correct.

Mr. Connolly: So you’re really just focused on policies and procedures given to you by WMATA and Veolia?

Mr. Holtz: Yes, that’s what we’re told to enforce.

(TR 217)

The only actions that the road supervisors may take come from the WMATA policies and

procedures. Where there is no discretion allowed then no "independent judgment" can exist.

The road supervisors, regardless of which contractor they are employed by, perform the duties established by WMATA. Road supervisor rules and regulations are written by WMATA and all road supervisors are perform the same job. The Road Supervisors do not issue discipline under the rule 2 (11) standard which has been laid out in the above cited decisions. Any evidence of secondary indicia does not hold any weight as the primary task of showing they were supervisors has not been met. All supervisors for all Companies are gathered together by WMATA monthly to learn how to apply the rules as WMATA intends. (Diamond Transportation p. 28)

In the case of First Transit, a third Metro Access Contractor, Road Supervisors were included in the certified bargaining unit and are now represented by the ATU. (See attached certification) Since the Board has already ruled that Diamond Transportation Road Supervisors are not considered supervisors under the Act and an election should be held, it stands to reason that all road supervisors for WMATA Metro Access be viewed the same way. There is no difference in their duties and it is illogical not to give all road supervisors the same bargaining rights. The Board should reverse its decision and allow the Road Supervisors to hold an election just as their peers at Diamond can pursuant to case number 05-RC-134217.

Respectfully submitted,

/s/ Brian Connolly
Brian Connolly
Douglas Taylor

Gromfine, Taylor & Tyler
1420 King Street, Suite 500
Alexandria, VA 22314

(703) 683-7782
dtaylor@lbgt.com
bconnolly@lbgt.com

Certificate of Service

I hereby certify that a copy of the foregoing Post Hearing Brief on behalf of the Union was emailed to Jim Foster, Esq. this 16th day of October 2014, to foster@mcmahonberger.com


Brian Connolly

ATTACHMENT

1

FILED FOR LITIGATION 1.02/02

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5**

First Transit, Inc. Employer and Amalgamated Transit Union, Local 689 Petitioner	Case 05-RC-112000
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TYPE OF ELECTION: STIPULATED

CERTIFICATION OF REPRESENTATIVE

An election has been conducted under the Board's Rules and Regulations. The Tally of Ballots shows that a collective-bargaining representative has been selected. No timely objections have been filed.

As authorized by the National Labor Relations Board, it is certified that a majority of the valid ballots have been cast for

Amalgamated Transit Union, Local 689

and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit.

Unit: All full-time and regular part time Drivers, Road Supervisors, Dispatchers, Maintenance Technicians, Maintenance Workers, Utility Clerks, Utility Workers, Mechanics, and Mechanics Tech II, and Gatekeepers employed at the Employer's Capitol Heights, Maryland facility; but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.



February 10, 2014

/s/ Steven L. Shuster

STEVEN L. SHUSTER

Acting Regional Director, Region 5
National Labor Relations Board

ATTACHMENT

2

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION FIVE**

DIAMOND TRANSPORTATION SERVICES, INC.

Employer

and

Case 05-RC-134217

AMALGAMATED TRANSIT UNION, LOCAL 689
a/w AMALGAMATED TRANSIT UNION, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein called the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein called the Board. Amalgamated Transit Union, Local 689, a/w Amalgamated Transit Union, AFL-CIO, herein the Petitioner or the Union, filed the petition seeking to represent a unit of "all full-time and regular part-time Road Supervisors employed by the Employer." The parties stipulated that any unit found appropriate should exclude all other employees, bus operators, utility workers, gatekeepers, office clerical employees, professional employees, managerial employees, guards, and supervisors as defined in the Act. The petition asserts there are approximately six employees in the proposed unit. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act, and that there is no history of collective bargaining between the parties for the petitioned-for employees.

Re: Diamond Transportation Services, Inc.
Case: 05-RC-134217

September 19, 2014

I. ISSUE & POSITIONS OF THE PARTIES

The sole issue in dispute is whether the individuals in the petitioned-for unit are "supervisors" within the meaning of Section 2(11) of the Act. The Petitioner contends that the individuals in the petitioned-for unit are employees. The Employer argues that road supervisors are Section 2(11) supervisors because they have authority to discipline employees, or effectively recommend such discipline.

Based on the record as a whole, and careful consideration of the arguments of the parties at hearing and in brief, I find that the individuals in the petitioned-for unit are not supervisors within the meaning of Section 2(11), and accordingly, I am directing a secret-ballot election in the petitioned-for unit.

II. FACTS¹

A. Overview of the Employer's Operations.

Since July 1, 2013, the Employer has been engaged in providing transportation services that are commonly known as paratransit services to disabled individuals under a contract with Washington Metropolitan Area Transit Authority (WMATA). The Employer provides paratransit services in Maryland, Virginia, and Washington, D.C. using vehicles owned by WMATA, but with its own staffs of drivers, dispatchers, supervisors, and management. The Employer maintains offices in Springfield and Lorton, Virginia.

¹ On several occasions during the hearing, the hearing officer cautioned the Employer's counsel about soliciting testimony through the use of leading questions. Where there are any conflicts in the hearing record between testimony elicited through leading questions and testimony from open-ended questions, I have given weight to the latter. Moreover, even if I were to give equal weight to this testimony, these factual conflicts show that the Employer has not met its evidentiary burden of proof that the road supervisors are Section 2(11) supervisors.

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Robert Werth is president of the Employer. Below Werth is General Manager Vernice Anderson. Next in the supervisory chain are: Operations Manager Tyrone Barksdale, Safety Manager Angel Randall, Training Manager Bernard Randall, and Business Manager Tom Furlong. All of these managers report directly to Anderson.²

The Employer's paratransit services are provided directly to customers by drivers, also known as operators. The Employer employs approximately 196 operators,³ with approximately 82 working at the same time during peak hours. Werth testified that Operations Manager Barksdale is the immediate supervisor of the operators. Operators receive approximately 110 hours of training at the commencement of their employment.

In between the operators and the Employer's management team are the road supervisors, the individuals at issue in this case. The road supervisor classification was created by the Employer in July 2013, as part of its contract with WMATA. At the time of the hearing, the Employer employed six road supervisors.⁴ The road supervisors report directly to Safety Manager Randall. The road supervisors typically work ten hour shifts, four days per week, and spend about 85 to 90 percent of their time on the road. All of the road supervisors were operators before they became road supervisors. In addition to their operator training, road supervisors receive 42 ½ hours of classroom training and 40 hours of training in the field with another road supervisor. The record includes a list of the road supervisors' training topics, such as professionalism, road/ride observation, fatigue management, and accident investigations.

² Throughout this decision, all instances of "Randall" refer to Safety Manager Angel Randall, unless noted otherwise; Training Manager Bernard Randall did not testify at the hearing.

³ This figure includes operators who work full-time, part-time, and those on leaves of absence or worker's compensation leave.

⁴ Werth testified that there are seven road supervisor positions; one position is currently vacant due to a resignation, but the Employer intends to fill this vacancy.

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However, the record contains few other details concerning the specific training road supervisors receive on these subjects, or the mechanics of how they are expected to make determinations in the performance of their duties. Road supervisors are paid approximately \$0.82 to \$1 per hour more than operators. The operators and the road supervisors are both paid hourly and receive overtime pay.⁵ The record does not indicate if road supervisors receive any other benefits (e.g., health insurance, retirement benefits, etc.) that differ from what operators receive.

The Employer operates 24 hours a day/365 days per year; both operators and road supervisors work around the clock.⁶ For the most part, operators are assigned to work out of one of the Employer's two facilities, with about half at each location, though there are occasions when an operator will temporarily report to the other facility. Since the Employer's Lorton location is closed on the weekends, all employees who work over the weekend will work out of the Springfield facility.

The road supervisors are the only Employer personnel who physically monitor the operators' performance of their duties out on the road; none of the Employer's managers make field observations of operators. Operators are also monitored by WMATA service monitors

⁵ All of the Employer's managers are salaried, with the possible exception of Safety Manager Randall. The record is unclear whether she is hourly or salaried.

⁶ General Manager Anderson typically works Monday through Friday from 8 a.m. to 5 p.m., and Operations Manager Barksdale typically works the same days from 3 a.m. to 1 p.m. Safety Manager Randall works from 10 a.m. to 6 p.m., five days a week. While those five days are not specifically noted in the record, presumably she works Monday through Friday because none of the managers physically work in the office over the weekend (whether any of the managers work remotely or on-call over the weekend is unclear). The other managers' schedules are not in the record.

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(individuals hired by WMATA to watch service providers), a quality assurance (QA) contractor,⁷ and DriveCam, an on-board video recording device.⁸

Both the drivers and operators are required to wear a uniform, which consists of black shoes, navy blue pants, a shirt with their name and WMATA's logo, and an ID badge. The operators wear blue shirts, and the road supervisors wear white shirts. The road supervisor's shirt also says "supervisor" on it.⁹ Occasionally, a road supervisor will perform driving duties, either to fill in for an absent operator or to earn extra money on a day off. When filling in for operators, road supervisors still receive their normal rate of pay and wear their white uniform shirts.¹⁰

WMATA determines a customer's eligibility for paratransit services. When an eligible person needs paratransit service, that person will contact WMATA's operation control center (OCC) to schedule a service appointment. Every evening, the OCC will generate a list of routes for the following day's service appointments using a software program called Trapeze, and

⁷ The QA contractor is a WMATA contractor whose responsibility is to monitor contractors' performance of paratransit services. Both the WMATA service monitor and the QA contractor observe operators for any violations of WMATA policy.

⁸ DriveCam is an onboard video recording system in the paratransit vehicles. The system is operated by a WMATA contractor. The DriveCam system has two cameras: one showing a forward view through the vehicle's windshield, and the other shows the operator. When a triggering event occurs, the DriveCam system saves a 20-second video recording showing events immediately before and after the triggering event. Typically, the Employer has access to the DriveCam footage the day after the triggering event. DriveCam also provides the Employer with regular reports such as a "top risky list" that identifies operators who may, for example, have too many instances of following another vehicle too closely. General Manager Anderson testified that road supervisors are not involved in disciplinary action stemming from violations reported by the DriveCam contractor.

⁹ The record shows that the Employer's dispatchers also wear a white uniform shirt. It is unknown if any of the managers wear uniforms.

¹⁰ At one point in her testimony, Road Supervisor Crystal Hall said that she wears an operator's shirt when working as a driver. Because I find that the road supervisors do not possess any primary Section 2(11) authority, I have not relied on secondary indicia of supervisory status, including any differences between uniforms.

Re: Diamond Transportation Services, Inc.
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transmit those routes to the Employer and WMATA's other paratransit contractors. Once the Employer receives these routes, General Manager Anderson will assign operators to each route, while maintaining a number of additional operators in reserve to cover for no-show or sick operators.¹¹ At the start of their shifts, operators will report to the Employer's dispatch office to receive their route manifest. This manifest lists each operator's schedule for that day, and has indications concerning each passenger's disability. The start of each operator's shift consists of a "pull-out," when the operator will perform a pre-trip inspection of his or her vehicle, ensure the vehicle is clean, determine that the wheelchair lift is operating correctly, and otherwise decide that the vehicle is in satisfactory condition. Following this pre-trip inspection, the operators leave the Employer's facility to begin their assigned routes. In practice, half of an operator's route may be rescheduled each day. This can occur for a number of reasons. For example, if an operator falls behind schedule, the OCC may assign some of that operator's remaining trips to another driver who is closer and likely to reach the customer during their appointment window.

B. Examples of Employer Policies and Related Consequences.

As described below, there are many detailed policies and procedures governing how operators are expected to perform their duties serving WMATA's customers. Similarly, in most situations, there are specific consequences that are linked to violations of these policies or procedures.¹²

¹¹ Werth testified that sometimes the work schedule is created by Operations Manager Barksdale, the dispatch manager (name unknown) or himself. There is no evidence that these schedules are created by road supervisors.

¹² At times, the parties attempt to identify whether a policy or the consequence for violating a policy is a creation of WMATA or the Employer. For the purpose of this decision, I find that these distinctions are irrelevant. Regardless of whether these policies or penalties were created by WMATA or the Employer, it is clear that none of them were created by the road supervisors.

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1. Door-to-Door Policy

Broadly, the door-to-door policy requires an operator to escort a passenger between the door of the vehicle and the door of the origin/drop-off location, though it actually consists of a detailed list of requirements. The door-to-door process begins when an operator pulls up to the customer's pick-up location.¹³ The operator will hit a "ride" button on the in-vehicle computer terminal, turn on a "kill switch," and put the vehicle's transmission in park. The operator will then pull in the vehicle's mirrors, put out a safety cone, and walk to the door of the pick-up location. The operator must knock on the door and wait one minute. When the customer comes to the door, the operator is responsible for greeting the customer, checking the customer's identification, and collecting the fare. The operator then escorts the customer to the vehicle, assists the customer into the vehicle, secures the customer in a seatbelt, and if applicable, secures the customer's wheelchair.

If an operator violates the door-to-door policy, the following consequences apply: on the first violation, the operator is retrained on the door-to-door policy; on the second violation, the operator is terminated.

2. Fatigue Policy

The fatigue policy provides the following consequences: first offense, the operator is removed from service until he or she completes retraining on the fatigue policy; second offense,

¹³ While not strictly part of the door-to-door policy, other policies provide that an operator is expected to arrive for a scheduled pick-up during a window of 15 minutes before or after the scheduled time. If the operator arrives before this 15-minute window, the operator is expected to park around the corner or up the street from the pickup location instead of in front of the customer's house.

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the operator is removed from service and cannot return until the operator receives clearance from a physician; third offense, the operator is terminated.

There are three ways an operator may be found to have violated the fatigue policy: observation, DriveCam, and self-reporting. Observations may be submitted to the Employer by a road supervisor, a WMATA service monitor, or by a quality assurance (QA) contractor. Road supervisors receive training about how to identify drivers who are fatigued; however, the details of this training, including *how* road supervisors conclude that an operator is fatigued, are not in the record.¹⁴ If a road supervisor identifies an operator as fatigued, the road supervisor must notify the OCC and the Employer's dispatch office, and the operator must be immediately removed from service. "Removed from service" means that the operator may not continue to operate the vehicle. A replacement operator will be dispatched to drive the vehicle, and the road supervisor will transport the fatigued operator back to the Employer. Operators are not paid for the time between when they are taken out of service until retraining, though they are paid for the time spent in retraining.

3. Drug and Alcohol Policy

The Employer has a "zero-tolerance" policy for operators who are found to have violated its drug and alcohol policy; all violators are immediately removed from service and terminated at the first offense.¹⁵ As with the fatigue policy, road supervisors receive training on the drug and

¹⁴ The record shows that all personnel are required to receive training on the fatigue policy, but it is unclear whether they all receive the same training.

¹⁵ The specific policy is not in the record. Thus, it is unknown what precisely triggers a violation of this policy (e.g., the presence of any measureable alcohol or drug in the operator's system; being under the influence of drugs or alcohol).

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alcohol policy, but the details of this training and how supervisors made any determinations or judgments is not in the record.

4. Electronic Devices Policy

The Employer prohibits operators from using electronic devices while operating a vehicle in revenue service.¹⁶ Any violation of this policy results in termination. If the driver is holding, but not using, an Employer-provided two-way radio while driving, the consequence is a ten-day suspension. Violations of this policy may be discovered through observation by a road supervisor, WMATA service monitor, QA contractor, or DriveCam. There is no evidence in the record of a road supervisor reporting a violation of this policy.

5. Uniforms Policy

Safety Manager Randall testified that road supervisors ensure that operators are in uniform, and can prevent a driver from going on the road if not in uniform. Road Supervisor Crystal Hall testified that if she notices an operator out of uniform at pull-out, she will notify Operations Manager Barksdale of her observation, and Barksdale proceeds according to his own discretion. She estimated that "98 percent of the time" Barksdale will agree with her assessment of whether an operator is properly in uniform. Hall testified that if she sees that an operator does not have on the proper uniform, she will recommend that the operator not go on their route. She said that her recommendations are not always followed, however. As examples, if an operator does not have an ID badge, the Employer will normally give the operator a replacement, though the operator may have to wait until Randall arrives to make a new badge. If Hall reports that an

¹⁶ Revenue service refers to vehicles that are transporting passengers, or on the way to pick up passengers. Supervisors' and training vehicles are non-revenue vehicles.

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operator's shoes are not all black, the Employer will let the operator go out, or that sometimes "it could be as small" as earrings that have to be taken out. She continued:

I'll let [Barksdale] know if...the operator doesn't have on this or is missing this. Sometimes they can get them what they need and send them out, and sometimes, if it's something as small as the color of their shoe, sometimes they will send them out [on their route.]

The record does not show whether operators can expect to be disciplined as a result of a road supervisor's observation that they are not in proper uniform, or that any operator has been disciplined as a result of a road supervisor's observations.

6. Preventable Accidents

If an operator is involved in an accident, a determination is made about whether the accident was preventable. A preventable accident is defined as an accident that would not have happened if not for the action of the driver. If an accident is determined to have been preventable, but there is no damage, the operator is allowed to continue in service, but will receive retraining. If the accident results in damage, the operator will be immediately removed from service, receive retraining, and a five-day suspension. In these cases, the operator is suspended regardless of the amount of damage, the operator's degree of fault, or prior accident record. A second preventable accident during an operator's 90-day probationary period results in termination.

C. Road Supervisor's Duties.

The Employer has two road supervisors working at any one time. One of these supervisors will be assigned to Maryland and Washington, D.C., and the other to Virginia.¹⁷ The

¹⁷ WMATA requires that the Employer's road supervisors monitor the Employer's operators. WMATA has multiple contractors, and each contractor has its road supervisors monitor its own

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road supervisors' schedules are created by General Manager Anderson and Safety Manager Randall. Other than assigning a road supervisor to a geographic area, the Employer does not pre-determine the road supervisors' daily routes. Instead, the Employer will inform road supervisors of particular concerns, such as reports showing operators with the worst on-time performance, or the operators who are believed to have issues with unsafe driving practices (i.e., operators who are on the "top risky list"). To observe the drivers that the Employer has identified because of possible timeliness or safety concerns, a road supervisor will have to determine what shift these operators are working, and if any of them are assigned to a route in the supervisor's geographic area. The Employer allows the road supervisors to determine how they are going to conduct their observations.

Road Supervisor Hall testified that she can usually decide for herself where she will conduct her observations on any particular day, though Safety Manager Randall can direct her to specific locations. Normally, when Hall is deciding how to conduct her observations, she "just picks them" from Trapeze or off the manifest. She also described the process as "random," and explained that sometimes there is no process for how she selects what to observe. If she wants to conduct her observations of a particular driver, she will use Trapeze to locate that driver's route. If she is not looking to observe any particular driver, she will use the paper manifest to pick her observation points. Hall testified that she typically uses the paper manifest.

Generally, a road supervisor's job is to observe the operators to ensure they are performing their duties in accordance with the policies established by WMATA and the Employer. Road supervisors perform these duties in three major ways: ride checks, road observations, and accident investigations. The Employer does not require the road supervisors to

operators, rather than having all of the contractors' road supervisors monitor the operators for all of the contractors.

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perform a specific number of observations per day, but does expect them to perform about 30 observations per week. An observation can be either a ride check or a road observation.

A ride check report is a document used by road supervisors to record an operator's performance of specific tasks, or compliance with specific policies, such as the door-to-door policy. The ride check report is a pre-printed form that contains several checklists where the road supervisor will mark each item as "satisfactory," "unsatisfactory," or "not applicable." For example, on the door-to-door checklist, the road supervisor will check whether the operator satisfactorily performed the following: proper fare handling; customer ID check; mirror folded in; assisted customer to door; operator kept visibility of vehicle; and parked no more than 150 ft. from door. There is also space on the form for supervisory comments.

A road observation form is a pre-printed form that is used to record observations of the operator while driving a vehicle. The road observation form contains checklists similar to those on the ride check report. For instance, the form has checkboxes pertaining to an operator's tasks surrounding railroad crossings: activates 4-way flasher; open side window; stops 15'-50' from tracks; and open passenger door.

Road supervisors complete ride check forms and road observation reports when they are able to observe the items on these reports, regardless of whether they observe a policy violation. If the supervisor does not observe a policy violation, the completed forms are simply filed. If the road supervisor does observe a violation, the completed form is turned in to either Safety Manager Randall or Operations Manager Barksdale. Additionally, where a road supervisor observes a policy violation, the road supervisor will also complete and turn in an incident report.

Hall testified that the Employer does not have a quota for incident reports. These reports are used to document instances of policy violations, customer complaints, witness statements,

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and other "incidents."¹⁸ Hall testified that road supervisors lack discretion as to whether or to complete incident reports:

HEARING OFFICER HELTZER: I guess the point is you decide whether you fill out these forms or not.

THE WITNESS: No. We respond to something, the incident has to be filled out. If we're required to respond to something or an incident, it was an incident and an incident report is filled out.

Hall is unaware of any circumstances where incident reports are used to document something positive about an operator's job performance. There is a space on an incident report for the operator to make comments.

If operators observe another operator commit a policy violation, they are not required to report this violation to the Employer. Road supervisors, however, are obligated to report violations, even if they observe a violation while they are working as an operator. When asked if a road supervisor would be penalized if that road supervisor observed something and did not report it, Safety Manager Randall testified, "[m]ost definitely. If they witness it and don't report it, that's a problem."

7. Road Supervisors' Authority to Issue or Recommend Discipline

General Manager Anderson testified that the Employer has a progressive disciplinary policy, with the following steps: verbal warning; written warning; suspension; and termination. She added, however, that discipline can occur in any order depending on the severity of the violation. Anderson described that the first step of the disciplinary process is when a road

¹⁸ The record is unclear if incident reports are routinely created during accident investigations, as the terms "incident" and "accident" sometimes appear to be used interchangeably.

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supervisor sees something and wants to give a safety talk or a verbal warning. She added, however, that Randall, Barksdale, or any other manager can also issue step-one warnings. Step two, according to Anderson is a counseling/written warning issued by Barksdale, Randall, or her. She testified that the decision about whether to issue this discipline is made by Barksdale or Randall, but not road supervisors. Anderson further explained that whenever an employee receives a written warning, suspension, or termination, that discipline is signed by a member of management, not by any of the road supervisors. Anderson testified that when it comes to what goes on in the field, she tries to let Safety Manager Randall and Operations Manager Barksdale handle all the discipline; Anderson does not review incident reports, ride check reports, or observation reports. Werth testified that he does not believe that road supervisors have access to operators' personnel files.

Safety Manager Randall and Werth broadly testified that the Employer relies on the observations of its road supervisors, and that the Employer does not conduct any independent investigation of facts reported by road supervisors. Road Supervisor Hall testified that she is unsure if she would be notified if one of her determinations was reversed by management. She added, however, that "there's a lot" of examples of when Randall communicates with her about an incident report, such as when Randall has more questions or needs additional details about an incident, or is otherwise not satisfied with Hall's report.

In another context, Hall explained the process of what happens when she is sent to investigate disputes between drivers and passengers or members of the public. Hall explained that she does not make any conclusions, but instead leaves this to management. Hall testified that she fills out an incident report and submits it to Safety Manager Randall. Hall also explained that she might confer with Randall if Hall has trouble wording her report. When asked if she

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knows what happens after she submits her report to Randall, Hall answered, "Not particularly, no." She testified that she has no further involvement after the report is submitted. Further, Hall denied recommending that someone be disciplined, saying the incident report is "just documentation." Hall testified that no one from the Employer ever asks her if she thinks an employee should be disciplined or terminated. Hall said she is not involved in terminating employees, and is not asked to provide recommendations about whether someone should be terminated.¹⁹ Similarly, Road Supervisor Bangalie Sesay testified that he has never consulted with Randall about recommending discipline, and that they never talk about discipline. Sesay explained, "I give the information to her, what happened on the violation, and I document it."

Notwithstanding Safety Manager Randall's testimony that road supervisors are expected to report policy violations, there are descriptions in the record of road supervisors having discretion to issue oral warnings instead of documenting violations in writing. There are examples of road observation and ride check reports that reference warnings, though Hall testified that there might be occasions where she sees something slight and does not document a warning at all. Hall also testified that it was within her discretion to write an infraction as an "incident," though she explained that even if she "didn't submit an incident, you would still write on your road observation or ride check [report] that I've warned this particular operator about a particular thing."²⁰

¹⁹ Hall further testified that she is not involved in hiring employees, transferring employees between the Employer's facilities, laying off or recalling employees from lay off, granting time off, assigning overtime, promotions, preparing employee evaluations, assigning drivers to their routes or prioritizing their work, adjusting drivers' grievances, and that she is not held responsible for drivers' mistakes. She also testified that she is not involved in granting bonuses to employees, and that she does not make recommendations about whether employees should receive bonuses.

²⁰ The record does not reconcile this testimony with Hall's earlier statement that road supervisors lack discretion to decide whether to complete an incident report.

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As a hypothetical example, Hall explained that if an operator committed a mistake in the door-to-door procedure, such as missing one of the required steps, she might issue that operator a warning. But, if the operator did not attempt to perform the door-to-door procedure at all, she would record this violation in writing. However, the record does not include evidence of an actual instance when a road supervisor issued a warning to an operator. Conversely, the Employer introduced copies of ride check and road observation reports reflecting that operators were issued warnings, but it never solicited testimony from the road supervisors who drafted these reports about the specific reasons for these warnings, or the supervisor's thought process in deciding to issue them.²¹

Safety Manager Randall testified that a road supervisor's oral warnings do not count as a step of the progressive discipline policy that managers enforce. However, she suggested there is a separate disciplinary system maintained by the road supervisors, and that these warnings count as the first disciplinary step in this separate disciplinary system. Specifically, Randall said:

Q. Would this [warning] count towards the progressive disciplinary actions that the Company maintains?

A. Yes, but it's kind of --it's held separate from a verbal warning that I would get.

HEARING OFFICER HELTZER: Why don't you explain that?

THE WITNESS: The road supervisors have the discretion to give a verbal warning before they actually write them up on a road observation and count it towards the first step in my disciplinary action.

HEARING OFFICER HELTZER: It does or not does not (sic)?

²¹ Specifically, the Employer did not ask Road Supervisor Hall about any of the warnings she apparently issued. (Employer Exhibits 12(b), 12(d), 12(f), 12(g), and 12(k))

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THE WITNESS: No, this does not count in the first step of a disciplinary action that I -- that counts as a first step in a disciplinary action that the road supervisor takes.

HEARING OFFICER HELTZER: Why don't you explain a little bit more about that?

THE WITNESS: So, a road supervisor has the discretion to -- if they see a driver has some type of safety violation, they have the discretion to verbally warn them and to give them a safety message. But if they catch them again, they also have the discretion whether this time, okay, I've already talk to you about it, I'm going to write it up on a road observation report and it into myself.

The Employer maintains a computerized record of the completed ride check and road observation reports. This record, referred to as a tracking report, is a digital document showing an aggregation of all ride check and road observation reports, including whether a road supervisor issued any warnings to an operator.²² Road Supervisor Hall spends between one and two days per week transferring data from the paper reports to a computer at the Employer's office. The other road supervisors will also perform this data-entry work if time permits, but they do not perform data entry to the same degree as Hall. This tracking report can be used by the Employer's managers for several purposes, including tracking work performed by the road supervisors, how many observations are being performed, or how many observations are being

²² At one point in time, Hall recommended that all road supervisors should check the Employer's records to see whether operators had received any prior warnings. Hall testified that the Employer has never required road supervisors to check for prior warnings, or even to record every warning. There is also some testimony that the road supervisors used to maintain a separate computer document showing warnings issued to employees. However, this document has not been maintained for at least six months because of a computer crash.

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performed at a specific location. However, the Employer does not use the tracking report to discipline operators. General Manager Anderson testified that with the exception of Hall's data-entry duties, all of the road supervisors perform the same duties out in the field, and all have the same level of authority.

D. Specific Examples of Road Supervisors' Observations.

The record contains testimony of two specific examples of situations involving a road supervisor's observation of an operator's work. Road Supervisor Hall testified about one particular observation of Operator Kofi Adusei. On July 11, 2014, Hall was working as an operator. Hall testified that when she was dropping off her passenger, she observed another Employer vehicle parked with the operator in the vehicle with the seat reclined. After Hall finished dropping off her passenger, she called Randall and reported that Operator Kofi Adusei was sleeping in his vehicle. Hall testified that Randall told her to pull Adusei off his route. Hall responded that she was working as an operator that day; Randall said she would send out a replacement operator and a different road supervisor to the location.

At the hearing, Hall recounted that Adusei claimed that he was praying, not sleeping. She said that she made the determination that Adusei was sleeping without consulting with anyone. When asked how she made her determination that he was sleeping, Hall testified that after completing the drop-off of her passenger, Adusei was still in the same position as he was when she first observed him three minutes earlier. Hall did not testify that she made a determination that these observed facts violated the fatigue policy, or *how* she made any judgment concluding that her factual observations evidenced a violation of the fatigue policy. Hall testified that she filled out an incident report and submitted it to Randall.

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Hall testified that she did not remove Adusei from service that day, and that he was removed from service by Randall and the Employer's dispatchers; she added that she could "only tell [Randall] that he's asleep." Hall said that had she been serving as a road supervisor that day, she could have removed Adusei from service herself, but only after notifying Safety Manager Randall, and that once it was determined that the route was going out of service, that she would call the OCC accordingly. Hall said that once someone is found to be fatigued, it is her understanding that the fatigued operator must be pulled off the route.

Hall testified that she knows what is supposed to happen when the fatigue policy is violated, but that she has no idea what happened to Adusei after she submitted her incident report. The Employer introduced an "Employee Coaching & Counseling Form" showing that Adusei received a written warning from Safety Manager Randall. This form is not signed by Hall. On this form, Randall wrote the following:

It was explained to Kofi Adusei that it is against WMATA policy to sleep inside a MetroAccess vehicle. He was also informed that according to [the fatigue policy, first occurrence], if a driver is observed by Contractor's road supervisor [to] be fatigued the driver must be immediately removed from service and [the] driver will receive..retraining. . . . In addition to retraining Mr. Adusei will be receiving one (1) safety point.

Randall testified that she looks at the details of incident reports for facts to cite on counseling forms. In Adusei's case, Randall noted that he was observed sleeping, and then she applied this fact to the fatigue policy to determine the appropriate level of discipline.

Hall also testified about another specific example of her observation of Operator Branden Johnson. The Employer terminated Johnson on July 17, 2014, for violating the drug and alcohol policy. Hall testified that this incident began when she saw one of the Employer's vehicles

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parked in a parking lot and decided to conduct a ride check.²³ Hall explained that when Johnson opened the door, she smelled alcohol. Hall immediately called Randall to inform her. Hall's testimony continued:

THE WITNESS: I told [Randall] that this driver smells of alcohol.

HEARING OFFICER HELTZER: Okay. What happened next?

THE WITNESS: And what would you like me to do next? And she said, you have to take him to get drug tested, but take the keys, have one of the yard personnel come pick up the vehicle, and take him to be drug tested.

HEARING OFFICER HELTZER: And what happened next?

THE WITNESS: I did so, and after I took him to get drug tested, I returned to the base with paperwork that the drug and alcohol place gave me and I gave it to her.

HEARING OFFICER HELTZER: And what happened next, if you know?

THE WITNESS: As far as I know, he was removed from service by me. But beyond that - well, I know he was terminated, but beyond, what happened in the middle, I don't know.

...

Q. BY MR. PARGAMENT: He denied being under the influence of alcohol?

A. No. He said I had a drink yesterday.

Q. But he was - - you were saying, I smelled - -

HEARING OFFICER HELTZER: What did he say?

THE WITNESS: He said that he had a drink yesterday.

HEARING OFFICER HELTZER: And what did you say, if anything?

²³ Hall did not explain why she chose to conduct this ride check.

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THE WITNESS: I mean I just went to [Randall] with it. . . .²⁴

The record does not include any documentation of a ride check, road observation, or incident report regarding this incident with Johnson. However, the Employer did introduce the following four documents from this incident: Employee Coaching & Counseling Form; Employee Separation Report; Observed Behavior Reasonable Suspicion Record; and Specimen Result Certificate.²⁵

The Observed Behavior Reasonable Suspicion Record is the only document signed by Hall. This form records information such as the employee's name, the date of the observation, the beginning and ending times of the observation, and the incident address. Below that, there are checkboxes where one can indicate whether the reasonable suspicion determination is for alcohol

²⁴ Later, in response to questions from the Employer's counsel, Hall testified:

Q. BY MR. PARGAMENT: It was your judgment that he was under the influence, correct?

A. Yes.

Q. Did anyone come out and examine Mr. Johnson before you took him for testing?

A. No.

Q. So your judgment was followed by the Company?

A. Yes.

This colloquy provides an example of where I have given less weight to a witness' answers in response to leading questions. In her earlier testimony, Hall did not testify that she made a "judgment" that Johnson was "under the influence;" she testified that she *smelled* alcohol, that she immediately reported this observation to Safety Manager Randall, and asked Randall what she wanted Hall to do next. Moreover, since Hall did not testify that she made a judgment that Johnson was under the influence, it is inaccurate to suggest that this judgment was "followed by the [Employer]." Assuming for the sake of argument that Hall did make such a judgment, there is no evidence about how she made it.

²⁵ The Specimen Result Certificate appears to be from the testing laboratory, and shows the results of a breath test administered to Johnson.

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and/or drugs, followed by 56 additional checkboxes used to characterize the employee's walking/balance, speech, actions, eyes, face, appearance/clothing, breath, movements, and eating/chewing. Finally, the form includes five questions to ask the employee about their use of drugs or alcohol.

In Johnson's case, Hall checked the box indicating the form was for a reasonable suspicion determination for alcohol. Next, under "EYES," she checked "droopy," under "APPEARANCE/CLOTHING," she checked "Having odor," under "BREATH," she checked "Alcoholic odor," and under "MOVEMENTS," she checked "Slow." There are no check marks in the walking/balance, speech, actions, face, or eating/chewing categories. Finally, Hall circled "Yes" in response to the question "Did employee admit to using drugs or alcohol?," followed by: When: "night before"; Substance: "Alcohol"; How much: "few drinks"; and When taken: "n/a"

The Employee Coaching & Counseling Form, signed by Randall, shows that Johnson was terminated on July 17, 2013. The "Explanation of Employee Conduct" portion of the form states:

On [date/time] Branden Johnson was observed at a pick up location at [address]. When Road Supervisor Crystal Hall aboard his vehicle 4612 to perform a routine road observation. At that time Ms. Hall observed the smell of alcohol and asked Mr. Johnson if he had been drinking. In response Mr. Johnson said that he had a drink the night before. Crystal Hall determined that according to company D&A policy Branden Johnson must be subjected to a reasonable suspicion D&A test. Ms. Hall downed his route and escorted him to Concentra Urgent Care Center where he tested positive on a breath alcohol Screening test of [test results].

In the "Record of Conversation" section, the form states:

Branden Johnson was informed that he was in violation of the Zero Tolerance D&A Substance Abuse Policy. [T]herefore, his action will result in immediate termination.

Finally, the Employee Separation Report states:

On July 17, 2013 [Branden Johnson] was in violation of reasonable suspicion. Zero tolerance of the D&A Policy. It was determined by a positive breath alcohol confirmation test.

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The Employee Separation Report is not signed, but provides, "All Involuntary Termination Must Have Human Resources Approval Prior to Termination."²⁶

E. Accident Investigations and Preventability Determinations.

In addition to observing operators, the road supervisors also have certain tasks when an operator is involved in an accident. When an operator is involved in an accident, that operator is required to contact the OCC and the Employer's dispatch office. The Employer's dispatch office will, in turn, will contact an available road supervisor and relay information, such as the route, the driver, the accident time and location, whether any clients are onboard the vehicle, and if there are any injuries. Immediately after this call, the road supervisor will contact Safety Manager Randall to alert her to the situation and to report the supervisor's "notify time." Upon arriving at the scene, the road supervisor will contact Randall again to report their arrival.

Hall testified that when she arrives at the scene of an accident, she will begin an investigation by talking to the operator, any clients, the occupants of any adverse vehicle, the responding police officers, and "whoever's there." Road Supervisor Sesay testified that he follows this same procedure. Both Hall and Sesay explained that after they have spoken with the available witnesses, they will contact Safety Manager Randall and tell her what the witnesses

²⁶ Besides these specific incidents involving Operators Adusei and Johnson, the Employer introduced additional road observation and ride check reports. However, the Employer did not elicit any testimony about these events, and specifically, the decision-making process of the participating road supervisors. In particular, the Employer did not question Road Supervisor Hall about a door-to-door violation committed by Operator Jalloh (Employer Exhibit 12(j)), or the fatigue violation involving Operator Ofosu (Employer Exhibit 12(p)). Similarly, the Employer did not ask Road Supervisor Sesay about a door-to-door violation committed by Operator Jones (Employer Exhibit 12(h)). Without evidence showing how the road supervisors reached their determinations in these incidents, I accord them little weight.

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have reported.²⁷ Both Hall and Sesay also testified that they may speak with Randall several times from the scene of the accident.

In addition to speaking with witnesses, the road supervisor will take photographs of the scene, and record details on an accident report such as: weather and road conditions, the traffic controls (if any), vehicle damage, traffic citations (if any), and a diagram of the accident scene. On the accident report form, there are also spaces for the operator and road supervisor to write narrative statements.²⁸

If there is no accident damage, the operator returns to service after writing their own incident report. If there is damage, and the accident is determined to be preventable, the operator must be removed from service. If there is a customer on board the vehicle, the operator will contact the OCC to have another vehicle dispatched for the customer.

In almost all cases, the determination about whether an accident was preventable is made by the responding road supervisor. Hall testified the "99% of the time" she determines by herself whether an accident was preventable. She explained that, "[m]ost of the times it's clear cut and you can tell what happened..." Safety Manager Randall offered a similar assessment: "After we read the accident packet, our accidents are pretty much cut and dry." As a specific example, Hall cited curb strikes, testifying as follows:

²⁷ Randall uses this information to create a brief description of the accident, which she is required to send to WMATA that day.

²⁸ The record also contains the following forms: (1) Accident Cover Sheet; (2) Decision Checklist for Post-Accident Drug and Alcohol Testing; (3) Struck While Stopped – Incident Review; (4) Medical Refusal Form; (5) Accident/Incident Investigation Root Cause Analysis Form; and (6) Accident/Incident Summary Sheet. The record is unclear if all of these forms are completed in every accident investigation. The timing of when these forms are completed is also unclear; the contents suggest that many of these forms are completed before a determination is made about whether an accident is preventable. Neither Hall nor Sesay testified in specific detail about how they complete these forms.

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If they struck a curb, we'll ask them, well, what were you doing if you struck a curb? They could have been backing, could have been turning. Ninety-five percent of curb strikes are preventable.

...

If it's a curb strike and you know the curb didn't move itself, they clearly hit the curb because they weren't paying attention[.]

Although Hall claims that most of the time she will make the preventability determination herself, she allowed that there are times when she will seek assistance, or leave the decision to others. She explained:

If I have a judgment issue, I can call [Safety Manager Randall] and let her know both sides. If I can't determine what actually happened, because it could be what they say, it could be what they say. Most of the times it's clear cut and you can tell what happened, but some - - I think I've had maybe once instance where I couldn't determine who hit me, so I will let someone else - - determine.

Sesay explained that his preventability determinations are guided by the criteria listed on the accident report forms. The "Struck While Stopped-Incident Review" form includes the following instruction:

Review the following questions. If the answer to any question is "No" the accident should be ruled preventable. Only when all of the questions can be answered "Yes" should it be ruled non-preventable. If the accident did not occur while stopped all answers should be "N/A"

After answering the six questions on the form, there is a space for "Other Factors for Consideration." Finally, the bottom of the form includes checkboxes for the decision on whether the accident was preventable or non-preventable based on the Employer's standards.

After the road supervisor has completed the investigation at the accident scene, the road supervisor will return to the Employer's office, complete an accident report, collect the operator's report, and turn all of the accident documentation in to Safety Manager Randall in the form of an "accident packet." Hall and Sesay both testified that they do not know what happens after they submit the accident packet to Randall.

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Safety Manager Randall testified that once the road supervisor turns in the accident packet, she reviews it to see all of the details. If the accident packet states that DriveCam was activated, Randall, Barksdale, and Anderson will review that footage, though this occurs after the road supervisor has submitted the accident packet with the preventability finding. Randall explained that there are occasions when she will speak to a road supervisor after she reviews the accident packet if she wants additional information or clarification. Her review of the packet is not dependent on an appeal from the operator; Randall explained that if she does not agree with the road supervisor's preventability determination, she can overturn it.

Randall estimated that about half of all accidents were deemed preventable, though she has reversed only two preventability determinations. In one instance, Randall changed a non-preventable accident to preventable where an operator struck a curb, because the curb was not mobile. On the other occasion where Randall reversed a road supervisor's conclusion, she changed a determination of preventable to non-preventable. In that incident, an operator's vehicle was struck while parked. Randall explained that after she reviewed the pictures of the accident scene, she did not agree with the road supervisor's determination and reversed it when the operator appealed.

If the accident is deemed preventable, Safety Manager Randall will schedule a time for the operator to receive their formal counseling. Any discipline stemming from the accident, such as the five-day suspension for a preventable accident with damage or termination, is normally issued by Operations Manager Barksdale or Safety Manager Randall. The Employer introduced documents from three accident investigations into the record. These accidents were investigated, at least in part, by either Road Supervisors Hall or Sesay. All three accidents were deemed

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preventable, but neither Hall nor Sesay were questioned about how they reached their preventability determinations in these specific cases.²⁹

One of these accidents was investigated by Road Supervisor Hall. On June 18, 2014, Operator Luis Merino stuck another vehicle during a turn, causing an accident. Merino was cited by a Virginia state trooper for committing an unsafe lane change. Thus, when completing the Employer's "Struck While Stopped-Incident Review" form, the response to Question 6 ("Was MACS Driver in compliance with...any applicable traffic laws or ordinances?") must be answered "No." This, in turn, militates for a finding that the accident be deemed preventable.³⁰

A second example in the record was investigated by Road Supervisors Hall and LaToya Hibbs. The record indicates that on May 19, 2014, Operator Debebe Fitamo failed to obey a red traffic signal, resulting in a broad side collision with another vehicle. The accident report states that Fitamo was issued a citation by a responding police officer.

Finally, the record indicates that Road Supervisor Sesay investigated an accident on January 17, 2014. In this incident, Operator Chang Kim pulled over on the side of a busy one-way street to note a change to his route. While parked, Kim claimed that another vehicle struck the driver's side mirror on Kim's vehicle. This accident was deemed preventable because it occurred while Kim was parked on a narrow road without sufficient parking space. Kim did not follow the Employer's policies requiring: (1) folding in the outside mirror; (2) placing a safety cone at the vehicle; and (3) not pulling over in a safe location, such as "a shopping center or place with enough parking." As with the other two accidents described above, these policy

²⁹ With the exception of the non-preventable determination that Randall ultimately overturned, there was no evidence introduced at the hearing of instances where a road supervisor concluded an accident was non-preventable, despite these accidents accounting for half of all accidents in 2014.

³⁰ On the Accident/Incident Investigation Root Cause Analysis Form, the "Contribution to the accident" is listed as: "Unsafe Lane Change 'Ticket'."

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violations require a "No" answer to Question 6 on the "Struck While Stopped-Incident Review" form ("Was MACS Driver in compliance with Company operating rules...?"), which results in a determination that the accident was preventable.³¹

F. Evidence of Secondary Supervisory Indicia.

Besides differences in pay, uniforms, and job duties, the record shows that road supervisors attend monthly meetings with the Employer's other managers where they discuss topics such as any policy updates from WMATA, or drivers who are on the "top risky list" or have poor on-time performance. As one example, Hall testified that Safety Manager Randall may say that DriveCam has indicated that an operator has repeated "following too close" incidents, and Randall will ask the road supervisors to watch that operator.

Road supervisors also attend monthly meetings at WMATA's office. These meetings are attended by road supervisors and managers from all paratransit contractors and WMATA officials, and provide the attendees an opportunity to share information with each other. WMATA provides road supervisors with permits that allow them access to WMATA's facility to attend these monthly meetings, and so they can take operators in for after-hours drug screenings.

Operators do not attend either type of these meetings, and they do not have access permits to WMATA facilities. Operators also do not have access to the Trapeze system, which is available to road supervisors.

³¹ Safety Manager Randall testified about other accidents that were deemed preventable. Terrance Epps was involved in a collision where his vehicle struck a garage. In another example, Anthony McGettian's passenger-side mirror struck a bus he was attempting to pass, breaking off the mirror. There is no evidence in the record concerning how these preventability determinations were made, or let alone the identity of the person (or persons) that made them.

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III. ANALYSIS

As I explain below, I conclude that the Employer has not satisfied its burden of establishing that the road supervisors are statutory supervisors. Initially, I find that the record evidence does not establish that road supervisors have the authority to discipline employees, or to effectively recommend their discipline. On the latter point, I conclude that the Employer did not establish by a preponderance of the evidence that road supervisors effectively recommend the issuance of safety points, provide oral warnings to operators, or otherwise effectively recommend discipline. Furthermore, I find that, even assuming that road supervisors discipline employees or effectively recommend their discipline, the Employer did not meet its burden to show that the road supervisors exercised the requisite independent judgment. Accordingly, I am directing an election in a unit comprised of the road supervisors.

A. *The Legal Standard for Supervisory Status*

Section 2(3) of the Act excludes from the definition of "employee" "any individual employed as a supervisor." Section 2(11) of the Act defines a "supervisor" as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

Individuals are determined to be statutory supervisors if they meet each of the following:

1) they hold the authority to engage in any one of the 12 listed supervisory functions; 2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment; and 3) their authority is held in the interest of the employer.

NLRB v. Kentucky River Community Care, 532 U.S. 706, 712-713 (2001), citing *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573-574 (1994).

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Section 2(11)'s definition is read in the disjunctive, and thus the Board considers possession of any one of its enumerated powers, if accompanied by independent judgment and exercised in the interest of the employer, sufficient to confer supervisory status. *Kentucky River*, 532 U.S. at 713. Supervisory status may likewise be established if the individual in question has the authority to effectively recommend one of the powers. See, e.g., *Children's Farm Home*, 324 NLRB 61, 65 (1997). The Board has held that an effective recommendation requires the absence of an independent investigation by superiors and not simply that the recommendation be followed. *Id.*

The burden of proving supervisory status rests on the party asserting that status. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006); *Kentucky River*, 532 U.S. at 711-712. The Board requires that supervisory status be established by a preponderance of the evidence. *Dean and DeLuca New York, Inc.*, 338 NLRB 1046, 1047 (2003). Lack of evidence is construed against the party asserting supervisory status. *Dean and DeLuca New York, Inc.*, 338 NLRB at 1048; *Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535, 536 fn.8 (1999). Conclusory evidence is not sufficient to establish supervisory status. The party bearing the burden must establish that an individual "actually possesses" a supervisory power; mere inferences or conclusory statements of such power are insufficient. See, e.g., *Golden Crest*, 348 NLRB 727, 731 (2006); *Volair Contractors, Inc.*, 341 NLRB 673, 675 (2004); *Sears, Roebuck & Co.*, 304 NLRB 193, 194 (1991). Moreover, where evidence is in conflict or otherwise inconclusive for a particular Section 2(11) indicium, the Board will decline to find supervisory status for that indicium. *Dole Fresh Vegetables, Inc.*, 339 NLRB 785, 793 (2003). Accordingly, job titles, job descriptions, or similar documents are not given controlling weight and will be rejected as mere paper, absent

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independent evidence of the possession of the described authority. *Golden Crest*, 348 NLRB at 731 (citing *Training School at Vineland*, 332 NLRB 1412, 1416 (2000)).

Since supervisors are excluded from the Act's protection, "the Board . . . exercise[s] caution not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied rights which the Act is intended to protect." *Avante at Wilson, Inc.*, 348 NLRB 1056, 1058 (2006) (citing *Oakwood Healthcare, Inc.*, 348 NLRB at 686); *Azusa Ranch Market*, 321 NLRB 811, 812 (1996).

B. Road Supervisors' Authority to Discipline and Effectively Recommend Discipline

The Employer's core argument is that its road supervisors have the authority to discipline operators, as well as the authority to effectively recommend the discipline of operators. In *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002), the Board adopted a Regional Director's finding that:

[T]he power to "point out and correct deficiencies" in the job performance of other employees "does not establish the authority to discipline." Reporting on incidents of employee misconduct is not supervisory if the reports do not always lead to discipline, and do not contain disciplinary recommendations. To confer [Section] 2(11) status, the exercise of disciplinary authority must lead to personnel action, without the independent investigation or review of other management personnel.³²

In *ITT Lighting Fixtures*, the Board stated that to support a claim that individuals had the authority to effectively recommend discipline, the party asserting supervisory status must prove that the putative supervisors: (a) submit actual recommendations, and not merely anecdotal reports; (b) their recommendations are followed on a regular basis; (c) the triggering disciplinary incidents are not independently investigated by superiors; and (d) the recommendations result

³² Also cited recently by the Board in *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 2 (Feb. 20, 2014)).

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from the putative supervisor's own independent judgment. *ITT Lighting Fixtures*, 265 NLRB 1480, 1481 (1982), enf. denied on other grounds 712 F.2d 40 (2d Cir. 1983), cert. denied 466 U.S. 978 (1984). The Board has consistently refused to find supervisory status where the putative supervisor's role in discipline is found to be merely reportorial. *Riverboat Services of Indiana, Inc.*, 345 NLRB 1286, 1286 (2005); *Hillhaven Rehabilitation Center*, 325 NLRB 202, 203 (1997); *Northwest Nursing Home*, 313 NLRB 491, 497-498 (1993); *The Ohio Masonic Home*, 295 NLRB 390, 394 (1989).

1. *Road Supervisors' Authority to Discipline*

In this case, I find that the Employer has failed to meet its burden that the road supervisors have authority to discipline employees. Preliminarily, the Employer's managers seem to have difficulty agreeing about the steps of Employer's discipline system. General Manager Anderson testified that an oral warning is the first step of the Employer's progressive discipline process, but Safety Manager Randall claims the Employer has two separate progressive discipline processes: one administered by road supervisors, and the other administered by managers. Randall testified that oral warnings are part of the progressive disciplinary process administered by road supervisors, but that a written warning is the first step in the managerial process.

In contrast with the managers' testimony, Road Supervisors Hall and Sesay claim they have no involvement in the disciplinary process at all. In this regard, their testimony was partially corroborated by General Manager Anderson, who explained that any written discipline issued to an employee is signed by management, and that she was unaware of any instances where a road supervisor signed a disciplinary action. Taking all of this evidence together, I conclude that there can be no genuine claim that road supervisors directly discipline employees

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by issuing written warnings, suspensions, or terminations in the Employer's progressive discipline system. Thus, the remaining issue is whether road supervisors directly discipline employees by issuing oral warnings.

For several reasons, I find that these warnings are not disciplinary. First, as described above, there are substantial conflicts in the record about whether these warnings are part of the Employer's progressive discipline system. The only individual who specifically claims that oral warnings are part of the progressive discipline system is General Manager Anderson. However, Anderson also admitted that she does not get involved in discipline in the field, but instead leaves this to Randall and Barksdale. As a manager more closely involved in disciplinary decisions, I assign greater weight to Safety Manager Randall's admission that these oral warnings are not part of the progressive discipline process administered by management. Notably, this portion of her testimony is consistent with the accounts of Supervisors Hall and Sesay. Examining the record as a whole, I cannot agree that the evidence supports a finding that the Employer maintains two progressive disciplinary systems. Rather than a disciplinary warning, the record evidence regarding these oral warnings is more akin to one co-worker pointing out and correcting the work deficiencies of another co-worker.

Having concluded that the Employer has only one progressive disciplinary system, I further find that a written warning issued by a manager is the first step of that disciplinary system. First, I note that this conclusion is consistent with the testimony of the road supervisors who testified, as well as with Randall's statement that written warnings are the first step of a progressive discipline system at the Employer. I also find that a road supervisor's warnings do not lay the foundation for future, or additional discipline; the Employer has not provided examples of an employee who received a written warning, suspension, or termination which cite

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a prior oral warning as the reason for the increased level of discipline. The Board has recognized that the authority to issue minor corrective actions, such as verbal and written warnings, is too minor a disciplinary function to confer supervisory status when there is no evidence that the warnings form the basis for further disciplinary or otherwise affect job status. *Ohio Masonic Home, Inc.*, 295 NLRB 390, 393-394 (1989); *Passavant Health Center*, 284 NLRB 887, 889 (1987), cited in *Mountaineer Park, Inc.*, 343 NLRB 1473, 1477 (2004).

On a slightly different tack, the Employer claims that because road supervisors have the authority to pull an operator out of service, and because this out-of-service time is unpaid, road supervisors have the authority to effectively suspend employees. I find, however, that there is insufficient evidence that these removals-from-service are, in fact, disciplinary, or that they are "effectively suspensions." I read Section 2(11) as requiring a putative supervisor to possess actual authority to mete out actual discipline, not actions that "effectively amount to" discipline, and the Employer has not cited any authority to the contrary. The facts here show that the Employer's progressive discipline system already provides for *actual* disciplinary suspensions, yet the Employer urges me to also find that when an operator is removed from service, this is *effectively* a disciplinary suspension. If a removal-from-service is a true disciplinary suspension, the Employer has failed to explain why it uses different terms to refer to what it argues are really the same thing. Further, unlike the true disciplinary suspension, this removal-from-service "suspension" is indeterminate, lasting only until the operator commences retraining. Rather than disciplinary, it appears that an employee's removal from service is dependent only on the logistics of training schedule. Because there is no set time period, in theory, an employee could begin retraining immediately after being removed from service (and be paid for this training time) and thus, suffer no "suspension" at all. Finally, the evidence does not show that these

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removal-from-service suspensions, in and of themselves, lay the foundation for any future discipline under the Employer's progressive disciplinary system.

2. Road Supervisors' Authority to Effectively Recommend Discipline

On the issue of whether road supervisors have authority to effectively recommend discipline, the evidence in the record is more substantial. At the outset, however, I note that there is no evidence showing that road supervisors make any explicit disciplinary recommendations, effective or otherwise. Rather, both of the road supervisors who testified disclaimed having any involvement in the Employer's disciplinary decisions. Road Supervisor Hall specifically denied providing the Employer with discipline recommendations, and Road Supervisor Sesay denied ever speaking about discipline with Safety Manager Randall. Instead, the road supervisors testified that they draft factual reports and deliver these reports to higher management. In response, the Employer asserts that even in the absence of any explicit disciplinary recommendations, road supervisors can effectively recommend discipline because their factual reports automatically lead to employee discipline without any independent review by higher management.

a. Safety Points

The Employer argues that road supervisors' reports may lead to the Employer issuing safety points. In *Oak Park Nursing Care Center*, 351 NLRB 27 (2007), the Board found that a group of licensed practical nurses (LPNs) were Section 2(11) supervisors because they had authority to complete counseling forms. The Board found that the counseling forms "are a form of discipline because they lay a foundation, under the progressive disciplinary system, for future discipline against an employee." *Id.* at 28.

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I will assume for the purpose of this decision that safety points are, by themselves, disciplinary. An operator's accumulation of safety points can lead to greater disciplinary consequences for future violations, and form a part of the Employer's overall progressive disciplinary policy. However, the Employer has not presented evidence that road supervisors make recommendations that employees receive safety points as a consequence for policy violations, or that road supervisors are involved in determining whether employees will receive safety points for any particular violation. To the contrary, Safety Manager Randall testified that the Employer's log of employee safety points is used and seen only by her, and that she (not the road supervisors) populates this log from different sources, which may or may not include information gleaned from reports prepared by road supervisors.

Further, the facts of this case are distinguishable from those in *Oak Park Nursing Center*. The road supervisors' involvement with safety points is more attenuated than the comparable discipline in *Oak Park*. In that case, the LPNs issued the counseling forms themselves. In this case, the road supervisors do not issue safety points or recommend that the Employer issue safety points. Instead, the road supervisors submit reports to Safety Manager Randall, who subsequently decides for herself whether to issue the employee any safety points, which may lay a foundation under the Employer's progressive disciplinary system for future discipline.

Here, the Employer essentially seeks a finding that road supervisors can effectively recommend discipline because they can draft reports, these reports can lead to safety points, and the safety points can lead to discipline under the Employer's progressive discipline policy. Instead, I conclude that road supervisors do not effectively recommend discipline when they submit reports of policy violations because they are too far removed from the safety-point and progressive-discipline processes.

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b. Oral Warnings

To any extent the Employer claims that a road supervisor's oral warnings constitute an effective recommendation of discipline, it is rejected. First, there is little evidence that road supervisors communicate these warnings to managers. While road supervisors make notes on ride check and road observation reports and then submit those reports to management, there is no testimony that a road supervisor ever informed a manager about an oral warning issued to an operator, and that discipline resulted.

Assuming that I adopt the Employer's argument that a road supervisor effectively recommends discipline by submitting an incident report to management, then an oral warning in lieu of this incident report is merely a decision to *refrain* from making a discipline recommendation. Accordingly, I find that these oral warnings represent a choice, made by road supervisors in undefined circumstances, about whether to submit observations of policy violations to higher management. When the Board was presented with an opportunity to address this issue, it declined to pass on the issue of whether a putative supervisor's decision to refrain from recommending discipline, by itself, established supervisory status. *Progressive Transportation Services, Inc.*, 340 NLRB 1044, 1046 fn. 6 (2003).

c. Independent Investigation or Review

The Employer also argues that the road supervisors effectively recommend discipline because discipline flows "automatically" from road supervisors' reports of policy violations to management. The Employer is correct that, in many instances, a road supervisor's report appears to cause the Employer to mechanically discipline an operator for any policy violations disclosed in that report. However, a key factor in considering whether a disciplinary recommendation is "effective" is whether higher-level supervisors conduct any independent investigation or review.

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The Employer's managers repeatedly emphasized during their testimony how upper-level managers do not investigate or review road supervisors' factual determinations. Although this has some surface appeal, without more, it is simply an unsupported conclusion. Where the testimony expands beyond these conclusory statements, and witnesses begin to describe the specific details of the disciplinary process, the full record shows that discipline is not as automatic as the Employer claims. The evidence shows several instances suggesting that higher-level managers *do* independently review the facts before issuing discipline. Furthermore, in the instances where there does not appear to be evidence of an independent investigation, the surrounding circumstances show that these situations are unremarkable and not warranting independent investigation. Accordingly, I find them unpersuasive.

Werth testified that management officials review all incident reports, and Safety Manager Randall explained that she reviews the various reports submitted to management by the road supervisors. During accident investigations, Randall (and other managers) review accident reports, witness statements, photographs, and DriveCam recordings if they are available. Further, Randall and other managers will review an operator's disciplinary record before any disciplinary action is conducted.

Even if I were to agree that road supervisors' reports almost always result in employee discipline, it does not necessarily follow that this discipline is "automatic," or that higher-level managers conduct no independent investigation or review. Examining many of the examples from the record, it appears that, in many cases, the Employer did independently investigate the supervisors' factual reports, though this investigation may have been very brief. In other instances, I do not place much weight on any absence of independent investigation by higher managers because there were no material facts in dispute.

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Safety Manager Randall's testimony shows that she reviews all accident preventability determinations and comes to her own conclusions. Such evidence undermines the Employer's argument that discipline flows automatically from a road supervisor's determination that an accident was preventable. As noted above, Randall reviews the accident packet and DriveCam footage after the road supervisor has determined an accident was preventable. If discipline flowed "automatically" from the road supervisor's preventability determination, no further review should be necessary, as the discipline would be inevitable. Further demonstrating Randall's independent investigation of preventability determinations, she admitted that she will follow-up with a road supervisor when she wants additional information or clarification about something in an accident packet, and that she conducts her review of the accident packet independent of any employee appeal. Finally, Randall testified that she has reversed road supervisors' preventability determinations following her reviews. In particular, I find it noteworthy that Randall reversed a road supervisor's finding that an accident was non-preventable where the operator had struck a curb. Moreover, there is nothing in the record suggesting that this case received heightened attention from Randall, or was otherwise different from every other review she conducts.

With curb strikes in particular, the record testimony shows that in nearly every case a curb strike is, by definition, a preventable accident, i.e.: the curb does not move. Yet Randall testified that she reviews photographs of accident scenes as part of her review of the accident packets. In some cases, she may also review DriveCam recordings. While the record does not discuss how much time Randall spends conducting her reviews, even if I assume that her reviews are brief, the fact that she may spend a few moments reviewing accident photographs does not

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mean that she did not conduct an independent investigation in those few moments – especially where the issue under investigation is as straightforward as the immobility of a curb.

In other examples, such as an accident involving an unsafe lane change or the failure to obey a red traffic light, these accidents were preventable under the Employer's policies simply by virtue of the traffic citations issued in these examples.³³ Thus, if the Employer's policies provide that an accident is preventable if the operator violated traffic laws, and there is evidence in the accident packet that the operator was issued a traffic citation, I conclude that the time for an independent investigation would be minimal. I do not read Board law to hold that an "independent investigation or review" requires a higher authority to completely verify or repeat every investigative step taken by the putative supervisor. In the regimented environment of the Employer's work rules and disciplinary policies, I am mindful that a few moments reviewing the accident photographs, witness accounts, and other evidence very well may be a sufficient amount of investigation to confirm a violation of the Employer's policies.

As an example from a different situation, the Employer conducted its own investigation into whether Operator Johnson was under the influence of alcohol while on duty. Johnson was not "automatically" terminated as the result of Road Supervisor Hall's perception that Johnson smelled of alcohol. Instead, Hall informed Safety Manager Randall that Johnson smelled of alcohol, and Randall directed Hall to take Johnson to a laboratory for testing. Johnson's counseling notice confirms that the laboratory results were a factor in the Employer's termination decision. Thus, when the Employer argues that Hall's observations automatically led

³³ Here, I take this opportunity to note the distinction between my finding that these accidents were preventable according to the Employer's criteria because the operator received a traffic citation versus a conclusion that these accidents were *deemed* preventable for this reason. As noted above, the Employer never asked the road supervisors to explain how they reached their preventability determinations.

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to Johnson's termination, the Employer omits the intervening step of the laboratory testing. The record does not show that Johnson would have been "automatically" discharged based solely on Hall's observations, and it certainly does not show that the Employer would have adopted her observations even if, for example, the laboratory results showed there was no alcohol in Johnson's system. If anything, the laboratory testing shows that the Employer independently investigated Hall's observation that Johnson smelled of alcohol, rather than automatically relying on Hall's report.

Similarly, the Employer does not automatically discipline employees when road supervisors submit incident reports concerning disputes between operators and customers. Hall testified that her role is limited to fact-finding, and that her involvement concludes when she submits her incident report. Safety Manager Randall explained that in situations where it is the operator's word against a customer's, she usually does not issue safety points, though the employee may be re-trained. This shows that rather than serving as a "rubber stamp" for the road supervisors, Randall reviews the evidence, and then draws her own conclusions before deciding whether or not to issue discipline.

With many of the remaining examples in the record, even if I were to assume that the Employer did not conduct any independent investigation of the road supervisor's report, I am not persuaded that these situations show that road supervisors effectively recommend discipline. The primary rationale for exploring whether a higher-level manager conducts an independent investigation or review of a putative supervisor's recommendations is to determine where the supervisory decision-making occurs. Implicit in this analysis, however, is that the circumstances of the underlying event (i.e. the facts resulting in the discipline) warrant an independent investigation. It is axiomatic that a failure to conduct an investigation is only noteworthy where

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there is something to investigate. In many of the examples supplied in the record, there is scant evidence that the affected operator was disputing the road supervisor's conclusions.³⁴ Further, it is also worth considering that the Employer's policies effectively limit the scope of any independent investigation to narrow inquiries. In the specific accident examples cited above, there is no evidence that any of the operators denied the conduct at issue. Absent such denials, it is not surprising that management may not have conducted an independent investigation into whether these accidents were preventable.

There is also little evidence that employees challenged supervisors' determinations in other situations. When Operator Adusei was caught sleeping in his vehicle, there is no suggestion that he appealed to Safety Manager Randall (or any other manager) that he was, in fact, praying. Similarly, the record is silent in situations where drivers were cited for failing to properly perform door-to-door service because, as examples, they either failed to get out of their vehicle, or failed to wait one minute for the customer. As with the preventability determinations, I find that it is unremarkable that the Employer may not have independently investigated incidents where there was no material fact in dispute.

Also, the record shows that a road supervisor is often in constant contact with Safety Manager Randall as an incident unfolds, as was the case in the incident involving Operator Adusei. This further diminishes the importance of any subsequent investigation because the evidence shows that Randall may provide real-time direction to the road supervisors. Thus, where the testimony shows that Randall provided contemporaneous direction to the road

³⁴ In the sole example where an operator did appeal a road supervisor's determination, Safety Manager Randall agreed with the operator and reversed the supervisor's preventability determination.

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supervisors, I hardly find it noteworthy that she may not have conducted her own, separate investigation.

For the reasons discussed above, I find that the evidence indicates that the Employer conducts independent investigations of its supervisors' observations. But, assuming further that management failed to conduct any independent investigation in certain circumstances, I do not find this lack of investigation persuasive in determining whether road supervisors can effectively recommend discipline. The factual examples in the record demonstrate that most situations are routine with little to no material facts in dispute, thus obviating the need for in-depth independent investigation.

d. *Lucky Cab Co.*

In concluding that the record evidence does not establish that road supervisors have the authority to discipline employees or to effectively recommend their discipline, I take into account the similarities this case presents when compared with the facts in the Board's recent decision in *Lucky Cab Co.*, 360 NLRB No. 43 (February 20, 2014). In that case, the Board found that the road supervisors at issue were not statutory supervisors. As with the road supervisors in the present case, the road supervisors in *Lucky Cab* prepared reports detailing their observations of drivers who were breaking work rules or violating traffic laws. *Id.* at slip op. 2. The *Lucky Cab* road supervisors similarly did not impose or actually recommend any discipline in completing these reports. *Id.* at slip op. 2. Likewise, the Board determined that the *Lucky Cab* road supervisors' reports were not established to lay the foundation for future discipline, just as I have found above. *Id.* at slip op. 3. Drawing upon the parallels between the *Lucky Cab* road supervisors and the Employer's road supervisors, I reach the same conclusion that the Board

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reached: that the record evidence does not meet the articulated legal standard for proving supervisory status.

C. Independent Judgment.

Despite my conclusion that road supervisors do not possess the authority to perform any Section 2(11) supervisory functions, I will still consider whether they can effectively recommend discipline with independent judgment. Based on the record before me, I find that even if road supervisors have the authority to effectively recommend discipline (or actually discipline), the Employer did not meet its burden of demonstrating that the road supervisors use the necessary independent judgment.

In *Oakwood Healthcare, Inc.*, 348 NLRB at 692-694, the Board established the contours of Section 2(11)'s requirement that supervisors use "independent judgment." Guided by the Supreme Court's holding in *Kentucky River*, the Board stated that "independent judgment" must rise above the merely routine or clerical, and "an individual must at minimum act, or effectively recommend action free of the control of others and form an opinion or evaluation by discerning and comparing data." *Oakwood Healthcare*, 348 NLRB at 693. Further, the Board held that in evaluating whether a putative supervisor acts with independent judgment, the Board must "assess the *degree* of discretion exercised by the putative supervisor" where at one end of the spectrum there are detailed instructions for the individual to follow, and at the other end the individual is wholly free from constraints. *Id.* (emphasis in original) The Board found that:

[A] judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, [or] the verbal instructions of a higher authority On the other hand, the mere existence of company policies does not eliminate independent judgment from decision-making if the policies allow for discretionary choices. *Id.*

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As discussed earlier, the Employer has numerous policies and procedures that govern the road supervisors' duties and decision-making. The road supervisors' primary job duty is to ensure that operators are performing their jobs according to the standards established by WMATA and the Employer. Road supervisors perform this duty mainly through road observation and ride check reports, but also through accident investigations.

The evidence also shows operators' job duties are also heavily controlled by detailed policies, such as those policies covering door-to-door procedures and the operators' use of electronic devices. Thus, when road supervisors are tasked with evaluating the operators, these evaluations become distilled into a series of black-and-white choices, with road supervisors marking checklists on Employer-provided forms. As examples, where the Employer requires an operator fold in the vehicle's mirrors, escort a customer to and from the vehicle, wait at the door for one minute after knocking, or wear a uniform, a road supervisor's monitoring of an operator's compliance with these rules is an all-or-nothing proposition; it does not require a road supervisor to exercise independent judgment.

In other situations, such as where a road supervisor observes an operator sleeping or smelling of alcohol, I find that there is insufficient evidence to conclude that Road Supervisor Hall's observations were based on anything other than routine and common human experience or sensory perception. When Hall testified that she encountered Operator Adusei sleeping in his vehicle, there is no evidence showing that she made this determination using anything other than routine, ordinary judgment. Further, she was never asked to explain how her observation that Adusei was sleeping led to her making any judgment that he had violated the Employer's fatigue policy. Although the Employer solicited evidence that road supervisors receive training on the fatigue policy, it offered no further explanation about the details of this training, nor did it show

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how Hall applied this training to determine Adusei was in violation of the fatigue policy.

Without sufficient evidence explaining how Hall arrived at her conclusions that day, I cannot find that she made her conclusions by exercising independent judgment.

Similarly, Hall testified that Operator Johnson smelled of alcohol, but there is no evidence that this observation was based on anything other than her sense of smell. Even if I were adopt the Employer's suggestion that Hall made a determination that Johnson was under the influence of alcohol, the Employer failed to have Hall explain the mental-thought process bridging the distance between Hall smelling alcohol and her conclusion that Johnson was under the influence of alcohol. Further still, the Employer failed to show that this mental-thought process involved Hall's own evaluation of data, rather than strict adherence to Employer guidelines.

Additionally, the testimony concerning these events show that Road Supervisor Hall did not act using independent judgment, but rather on detailed instructions from a higher authority. Hall explained that in both incidents, she immediately contacted Safety Manager Randall for instructions about how to proceed; there is no dispute that Hall thereafter acted in accordance with the instructions she received from Randall.

With accident investigations and preventability determinations, the evidence shows that a significant amount of decision-making does not rise above "the merely routine or clerical," and that road supervisors are heavily constrained by the Employer's policies and procedures. As discussed previously, many of the conclusions in accident investigations stem from ordinary sensory perceptions, or obvious, common-sense experience. As examples, it does not require the use of independent judgment to record basic facts such as weather conditions, pavement type,

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and posted speed limits. Similarly, it does not require independent judgment to determine fault where an operator's vehicle strikes an inanimate, fixed object such as a curb or garage.

Further, the Employer controls how road supervisors reach their conclusions about whether an accident was preventable. Road Supervisor Sesay explained that his decisions are guided by the criteria on the Employer's forms. In this regard, the Employer's "Struck While Stopped-Incident Review" form essentially creates a decision tree, or flow chart, that requires a road supervisor to follow the Employer's pre-determined decision-making process for evaluating whether an accident was preventable, and dictates a specific decision based on answers to the Employer's pre-determined questions. The form instructions provide that a road supervisor should rule an accident was non-preventable "[o]nly when all [six] questions can be answered "Yes," and concludes with the prompt, "*Decision based on Diamond Transportation Defensive Driving Standards*" : Preventable/Non Preventable. (emphasis added).

Earlier I discussed why the circumstances of the example accident situations may not have led to an independent investigation by the Employer. For similar reasons, I find that the examples did not require the use of independent judgment to determine preventability. For example, one might conclude, based solely on ordinary and routine judgment, that an accident was preventable any time a driver disobeys a red traffic signal, even in the absence a specific employer policy. In this case, however, the Employer has specific preventability criteria, which includes violation of traffic laws. Thus, in a situation where there was an accident and the operator received a traffic citation, the road supervisor is to indicate that the accident was preventable. Thus, I find that the Employer has failed to establish that the road supervisor's conclusions were formed using independent judgment.

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Additionally, the Employer argues that road supervisors exercise independent judgment because they have discretion to provide warnings instead of formal write-ups. I find that the Employer has not shown that road supervisors exercise sufficient discretion to fall within the Board's test for independent judgment. In *Oakwood*, the Board emphasized that the issue is not whether putative supervisors exercise discretion, but the *degree* of discretion. Thus, the repeated references in the record to road supervisors using discretion are not dispositive. Rather, they are conclusory statements unsupported by specific facts. There is little evidence about the limits of road supervisor's discretion, but such limits clearly exist. In this regard, Safety Manager Randall explained that it would "most definitely" be a problem if a road supervisor failed to report an observed violation. At the other end of the spectrum, Road Supervisor Hall testified that she might issue an oral warning if, for example, an employee performed every step in the door-to-door procedure except something minor, like folding in the vehicle's mirror. Notwithstanding the conflict in such testimony, I cannot give credence to the Employer's argument when the record leaves unanswered all types of conduct in between. For example, it is unknown whether a road supervisor could give an operator an oral warning if the operator was caught sleeping on the job, or smelled of alcohol. Without sufficient points of reference, it is simply not possible to discern where a road supervisor's discretion sits along the scale of independent judgment.³⁵

³⁵ I also note that, in many instances, discipline flows from a road supervisor's ride check and road observation forms. However, it is undisputed that the Employer expects road supervisors to complete at least 30 observations every week, and that a road supervisor is to complete an observation form any time they conduct an observation, regardless of whether or not a policy violation occurred. Thus, even assuming that these reports are disciplinary recommendations, I find that the Employer's quotas undercut its argument that road supervisors exercise independent judgment in deciding whether to conduct observations, or in deciding to submit reports of completed observations.

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Finally, road supervisors do not use independent judgment in deciding how they will conduct their observations. As a preliminary matter, it is unclear that these judgments implicate the exercise of any Section 2(11) indicia. A road supervisor's judgments about what to observe, when to observe it, and where this observation will take place primarily concern how the road supervisor will perform his or her *own* duties, not how the operators perform theirs. Even assuming that a road supervisor's decision about how she will conduct observations implicates Section 2(11) authority, there is insufficient evidence that these decisions are made with independent judgment. Road Supervisor Hall testified that she normally choose her observations at random. When the Employer directs a road supervisor to respond to accidents or other incidents, it appears that the road supervisor has no discretion about whether or when to respond. Lastly, the remaining evidence indicating that road supervisors "exercise discretion" in choosing their observations is conclusory. Assuming road supervisors can make discretionary choices, there is no evidence concerning any limits the Employer places on this discretion, and thus, no way for me to evaluate whether the degree of discretion amounts to independent judgment.

D. Secondary Indicia

In addition to its contentions regarding the alleged supervisory status of the road supervisors, the Employer cites to several secondary indicia of supervisory status. Among other things, the Employer notes that road supervisors wear white shirts, do not transport passengers, earn slightly higher wages than operators, receive additional training, and attend meetings with Employer managers and WMATA representatives that operators do not attend. Since I find that the Employer has failed to show that road supervisors possess any primary indicia of supervisory

Additionally, I decline to find that the road supervisors exercised independent judgment in the examples where the Employer submitted documentary evidence, but did not ask the road supervisors about their decision-making processes in those situations.

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authority which they exercise with independent judgment, I do not rely on these secondary indicia. In the absence of evidence that an individual possess one of the primary indicia of Section 2(11) supervisory status, "secondary indicia are insufficient by themselves to establish supervisory status." *Ken-Crest Services*, 335 NLRB 777, 779 (2001).

IV. CONCLUSIONS AND FINDINGS

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The Employer, a Virginia corporation, with an office and principal place of business in Springfield, Virginia, is engaged in the business of providing transportation services to private and governmental entities, including the Washington Metropolitan Area Transit Authority. As part of its operations described above, the Employer supplies transportation services to the Washington Metropolitan Area Transit Authority at facilities currently located at 7900 Hill Park Court, Lorton, Virginia and 6851 Industrial Road, Springfield, Virginia, the only locations involved in this proceeding. During the past 12 months, the Employer, in conducting its business

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operations described above, has had gross receipts in excess of \$250,000 from points outside the Commonwealth of Virginia. The parties stipulated, and I find, that the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

6. I find the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time road supervisors employed by the Employer, excluding all other employees, bus operators, utility workers, gatekeepers, office clerical employees, professional employees, managerial employees, guards, and supervisors as defined in the Act.

V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by Amalgamated Transit Union, Local 689 a/w Amalgamated Transit Union, AFL-CIO. The date, time, and manner of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strikes,

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who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within seven days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election. To be timely filed, the list must be received in the Regional Office, National Labor Relations Board, Region 5, Bank of America Center -Tower II, 100 South Charles Street, Suite 600, Baltimore, Maryland 21201, on or before September 26, 2014. No extension of time to file

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this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (410) 962-2198. Since the list will be made available to all parties to the election, please furnish a total of two copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on non-posting of the election notice.

RIGHT TO REQUEST REVIEW

Right to Request Review: Pursuant to the provisions of Section 102.67 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, you may obtain review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, DC 20570-0001. This request for review must contain a complete statement setting forth the facts and reasons on which it is based.

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Procedures for Filing a Request for Review: Pursuant to the Board's Rules and Regulations, Sections 102.111 – 102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, DC by close of business on October 3, 2014 at 5 p.m. (ET), unless filed electronically. **Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically.** If the request for review is filed electronically, it will be considered timely if the transmission of the entire document through the Agency's website is **accomplished by no later than 11:59 p.m. Eastern Time** on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.³⁶ A copy of the request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-filing system on the Agency's website at www.nlr.gov. Once the website is accessed, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file the request for review will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off line or unavailable for some other

³⁶ A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

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reason, absent a determination of technical failure of the site, with notice of such posted on the website.

(SEAL)

/s/ Charles L. Posner

Dated: September 19, 2014

Charles L. Posner, Regional Director
National Labor Relations Board, Region 5
Bank of America Center -Tower II
100 South Charles Street, Suite 600
Baltimore, Maryland 21201